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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 79

LEHIGH VALLEY COOPERATIVE FARMERS, INC., et al.,

Petitioners

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinions Below

The Opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 183 F. Supp. 80 (1960). The Opinion of the United States Court of Appeals for the Third Circuit is reported in 287 F. 2d 726 (1961).

Jurisdiction

The judgments of the United States Court of Appeals for the Third Circuit were entered February 20, 1961. The

jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

Statutes and Orders Involved

The statute involved is the Agricultural Marketing Agreement Act of 1937, Act of June 3, 1937, 50 Stat. 246, 7 U. S. C. 601 et seq. The provisions essential to this case are as follows:

> Milk and its products; terms and conditions of orders
>
> 8c(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices *shall be uniform as to all handlers,* subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. (Emphasis added.)
>
> (B) Providing:
>
> (i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the

production for market of milk covered in such order or by producers who, during such representative period, have produced at least three fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this section.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following

the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

• • • • • •

Terms common to all orders

8c(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) of this

section orders shall contain one or more of the following terms and conditions:

• • • • • •

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order.

The administrative Order involved herein is Order No. 27, as amended, regulating the handling of milk in the New York-New Jersey Milk Marketing Area, 7 C.F.R. Part 927. The Order is set out in full in the Appendix, R. 815a et seq., and the provisions involved in this case are:

Section 927.5	Dairy Farmer	R. 820a
Section 927.6	Producer	R. 820a
Section 927.7	Handler	R. 820a
Section 927.9	Pool Plant	R. 821a
Section 927.83	Payments on milk received from dairy farmers at non-pool plants	R. 879a
Section 927.84	Payments on milk or milk products the source of which is not established	R. 882a

Questions Presented

1. Does Section 8c(5), and particularly subsection 8c(5)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, which requires that "such prices shall be uniform as to all handlers," permit the Secretary to impose on handlers operating non-pool plants, compensatory payments which, when added to the actual prices paid by such handlers to dairy farmers or producers for the milk, result in a substantially higher price than is required to be paid by handlers operating pool plants under Order No. 27?

2. Does subsection 8c(7)(D), which authorizes provisions "incidental to," "not inconsistent with" and "necessary" and which this Court has said gives opportunity only to include

provisions auxiliary to and not in conflict with those definitely stated, permit the imposition of such compensatory payments?

3. Does subsection 8c(5)(G), which provides that a Federal Order applicable to milk and its products shall not prohibit the flow of milk from any production area into a marketing area, permit provisions imposing such compensatory payments when the effect of such provisions is, in fact, to prohibit the entry into the marketing area of outside milk?

4. If subsection 8c(7)(D) does permit the imposition of such compensatory payments without regard to the standard of price uniformity specified in subsection 8c(5)(A), is it an illegal delegation of legislative authority in that no standards are set with which the Secretary must comply?

5. Do the words "producers" and "handlers" used in subsection 8c(5)(A) mean only "pool handlers" and "producers shipping to pool plants", even though those terms were not used by the Secretary until long after the enactment of the statute, and despite the fact that the Secretary in Order No. 27 defines "handlers" to include both non-pool and pool handlers?

6. If the meanings of the words "producers" and "handlers" are thus limited, does the statute then authorize the Secretary to regulate non-pool handlers and dairy farmers in any respect?

7. Can it be said that handlers who have served a segment of the present marketing area over a long period of years before the expansion of the marketing area, caused a loss of sales to producers who ship to pool handlers?

Statement of the Case

A hearing was held pursuant to the authority of the Marketing Agreement Act of 1937, as amended, for the purpose of determining first, if thirteen (13) counties in Northern

New Jersey should have federal milk regulation; secondly, should regulation be achieved by a separate order; and finally, what should be the provisions thereof. The hearing call and the rulings of the Secretary of Agriculture limited the questions to the promulgation of a separate order for this area, or no order at all. Extension of the existing marketing area of the New York Order, No. 27 to include Northern New Jersey could not have resulted from the hearing, inasmuch as that proposal was not in the call.

After eighty-two (82) hearing days and approximately 12,000 pages of testimony, the hearing call was expanded on five (5) days' notice to permit consideration of the additional question of including Northern New Jersey in the marketing area of Metropolitan New York. The expanded hearing call was insisted upon throughout the hearing by two of the dominant cooperatives operating in New York. The new call stated that the record previously developed could be used by the Secretary in a determination of this question, even though this proposal was not an issue during the development of the previous record. The Petitioners through counsel objected to proceeding on the additional call on such short notice, and to the use of the previous record in resolving the new question. The Hearing Examiner overruled Petitioners' objections. The hearing then continued for another twenty-four (24) days.

The Secretary issued an order effective August 1, 1957, which contained provisions, among others, expanding the marketing area of Metropolitan New York to include the thirteen (13) counties of Northern New Jersey. The Order by definition included the Petitioners as handlers. (R. 820a.) It also provided certain conditions which were required for a plant to be designated a pool plant. (R. 821a.) Anyone operating a pool plant is known as a pool handler. Other plants were designated non-pool plants, and those operating such plants are known as non-pool handlers. Producers of milk shipping to pool plants were defined by the Order as "producers". (R. 820a.) Those shipping to non-pool plants were designated as "dairy farmers". (R. 820a.)

The Order also classified milk subject to Order No. 27 into three basic classes: Class I (I-A and I-B—fluid milk) carrying the highest price; Class II (cream), carrying the next highest price; and Class III (milk products such as butter, cheese, etc.) carrying the lowest of the three prices. The Petitioners sell only packaged fluid milk in the marketing area, except an insignificant amount of fluid cream. Their sales in the marketing area are limited to Phillipsburg, New Jersey and environs. Class III milk is commonly referred to in the industry as surplus milk.

The Order then included Sections 927.83 and 927.84 (R. 879a and 882a) referred to by the Secretary in his decision in support of the Order as "compensatory payments" (R. 743a). These sections are substantially the same as the sections that previously appeared in Order No. 27, which were invalidated by the Court of Appeals for the Second Circuit in the case of *Kass v. Brannan,* 196 F. 2d 791, C. A. 2 (1952). cert. denied 344 U. S. 891. These provisions, here contested, required non-pool handlers, the category in which Petitioners fall, to contribute to the Producer Settlement Fund the difference between the Class I price and the Class III price for all milk sold in the marketing area as Class I. Under the terms of the Order, these payments are then added to the payments due the producers shipping to pool plants who did not produce such milk and whose handlers did not market the milk in the area. This requirement disregarded the uncontroverted facts that the Petitioners had served the Phillipsburg market for 15 and 27 years, and were paying producers for the milk sold there and elsewhere substantially more than the Order No. 27 Class III price. The Secretary in his decision supporting the Order found this to be true. (R. 708a.) In fact, the Petitioners paid more than Order No. 27 Class I prices for the milk sold in and out of the area. The payments demanded of Petitioners, when added to the prices they paid for milk, amount to substantially more than was or is being paid by their competitors whose prices are fixed by Order No. 27.

These sections impress penalties upon the Petitioners of sufficient severity to drive them from a market of which they are an historical part. Their effect is to preempt to handlers and producers customers in the market which they had never served.

The market built and served by the Petitioners was not developed by the sale of cheap milk. The Pennsylvania Milk Control Commission, created originally in 1933, for the time here involved fixed prices to be paid producers by handlers for milk packaged in the area where Petitioners are located, and sold either outside the Commonwealth of Pennsylvania or within the Commonwealth of Pennsylvania. These prices for Class I milk are higher than the Order No. 27 prices for milk of the same usage.

The financial burden upon Petitioners excludes them from this market and gives the Order No. 27 handlers a closed market, even though Petitioners have never enjoyed and do not seek to enjoy any special price advantage or any other advantage whatsoever.

Lehigh Valley Cooperative Farmers, Inc., and Sunerest Farms, Inc., on August 1, 1957, the first day they could do so, filed petitions with the Secretary of Agriculture for an administrative review of Sections 927.83 and 927.84, the compensatory payment provisions of Order No. 27 effective August 1, 1957. The Petitions were filed pursuant to the administrative remedy provided by Section 8c(15)(A) of the Agricultural Marketing Agreement Act. Simultaneously the Department was requested to grant an Interim Stay, which was denied. Subsequent to filing the Petitions, the United States on September 7, 1957, moved against the Petitioners by an enforcement proceeding in the United States District Court for the Eastern District of Pennsylvania. The District Court, by an injunctive order, required the Petitioners to comply with the Order pending the ultimate disposition of the (15)(A) and the (15)(B) proceedings. The Order, however, directed that the monies demanded of the Petitioners by the Administrator of Order No. 27

be paid into the Registry of the Court. To comply with the provisions of Order No. 27 and the Court's injunctive order, the Petitioners were required to file monthly reports with the Administrator of the Order. By these reports Petitioners were forced to elect pool or non-pool status, even though the validity of Sec. 927.83 was then under attack.

The petition for administrative review as provided by the statute was heard before an independent Hearing Examiner. After full hearing and consideration of the facts and law involved, he filed his Recommended Report invalidating the compensatory payment provisions. Exceptions to the Report were filed by the Secretary of Agriculture, and following argument before the Secretary's Judicial Officer, the questioned provisions were ruled valid and lawful.

Petitioners appealed to the United States District Court for the Eastern District of Pennsylvania, pursuant to Section 8c(15)(B) of the Act. The cause was argued before Judge Clary of that Court. Subsequently he handed down an Opinion and Order declaring that Sections 927.83 and 927.84 violated the uniformity clause of Section 8c(5)(A) of the Act, and were, therefore, invalid. As found by the Hearing Examiner in his Recommended Report, which Finding was not overruled by the Judicial Officer, the District Court determined that milk for fluid usage could not be purchased in this area at the Class III price, and that the price required to be paid by these petitioning handlers for milk sold in the marketing area and elsewhere was higher than that of their competitors, who were Order No. 27 pool handlers. This fact has not been controverted by the Government at any stage.

The (15)(B) and enforcement proceedings were consolidated by the United States District Court. The Secretary of Agriculture and the United States appealed the decision of the District Court to the United States Court of Appeals for the Third Circuit. The decision of that court by Judge McLaughlin issued on February 20, 1961, reversed the District Court. Petitioners filed an application for rehearing,

which was denied on March 10, 1961. The Court of Appeals in no way disturbed the Findings of Fact of the Hearing Examiner or the District Court.

Petitioners petitioned this Court for a Writ of Certiorari which was granted June 19, 1961.

Summary

On August 1, 1957, the Secretary of Agriculture of the United States, acting under the authority of the Agricultural Marketing Agreement Act of 1937, as amended, 7. U. S. C. 601 et seq., extended the New York Metropolitan Milk Marketing Area described in Order No. 27, 7 C. F. R. Part 927, to Northern New Jersey. The extension brought Phillipsburg, New Jersey and its environs, as well as other portions of Northern New Jersey, under the jurisdiction of Order No. 27 for the first time.

Included in the terms of Order No. 27 to which Petitioners became subject by the amendment of August 1, 1957, are provisions for the establishment of uniform class prices all handlers in the market are to pay for milk they purchase from producers, based upon the form in which it is sold.

It is also provided that all producers shall receive a uniform price which results from a division of the total use value of the milk sold in the area by the volume of milk sold. A Producer Settlement Fund, or Equalization Fund has been established by the Market Administrator to make possible the calculation and payment to producers of the uniform price. Handlers who participate in the pooling arrangement are known as pool plants or pool handlers. Pool farmers, defined in the Order as "producers," are limited to those who ship milk to pool plants or handlers.

By thus specifying certain handlers and producers who shall make up the pool, there remain handlers and farmers who also sell milk in the marketing area but are not a part of the pool. These are described in the Order as non-pool plants, or handlers, and the farmers who ship to them are

dairy farmers. Petitioners are non-pool handlers, and their shippers are dairy farmers.

The Secretary, by another provision in the Order, Section 927.83, has imposed upon non-pool handlers an obligation to contribute to the pool for distribution among the producer-members of the pool a payment, which he terms a "compensatory payment," measured by the difference between the Class I and Class III prices established in Order No. 27 on all milk sold by Petitioners in the marketing area. It is to this payment that Petitioners object.

Petitioners filed an appeal under the Review sections of the Act, 8c(15)(A) and (B), immediately after August 1, 1957, the effective date of the amendment to Order No. 27. Enforcement proceedings were brought by the Secretary, and Petitioners were directed by the Court to pay the contested charges into the registry of the Court from month to month until the litigation is terminated. For milk sold in the area to July 31, 1961 Lehigh's payment into the registry was $617,454.22, and that of Suncrest $108,767.79.

The Record of the hearings upon which the amendment of August 1, 1957 was based, the Findings of Fact in the Secretary's Decision in support of that amendment, the Records of the Review Proceedings in these cases, the Findings of the Hearing Examiner in the administrative proceedings, and the Findings of Fact of the District Court are in agreement that Petitioners must pay the uniform Order No. 27 blend price or something in excess thereof, in order to procure the milk they sell in the marketing area. This price is substantially in excess of the Order No. 27 Class III price. The result is that the prices Petitioners must pay plus the compensatory payment exacted from them of 5¢ to 6¢ a quart are substantially higher than those required to be paid by pool handlers under Order No. 27. The Record of the review proceedings also discloses that Petitioners paid more for their *Class I* milk than the Order 27 class price. The increased prices imposed upon Petitioners in the form of the contested compensatory payments will render their

competitive position in the area untenable, and abandonment of their sales to Order No. 27 pool plants inevitable. The Secretary erroneously assumed he had a choice to make: to accord uniform treatment to all handlers and farmers *for milk they sell in the marketing area*, or to exclude all handlers and farmers from participation in the market except those who make up the pool. He chose the latter. The Secretary's actions are in direct violation of the specific provisions of the Act, and contrary to the intention of Congress clearly set forth in the legislative history of the Act.

In the depression years in the early 1930's the Congress of the United States authorized the Secretary of Agriculture to regulate the handling of various agricultural commodities, among them milk. The delegation of power was made in specific terms and in accordance with clearly stated standards. Both the delegation and the standards are completely contained in Sections 8c(5) and 8c(7)(D) of the Act. The power conferred was to fix minimum class prices which all handlers were required to pay for milk sold in a marketing area, which the Secretary was authorized to establish. It was provided that those prices were to be uniform as to all handlers. In addition, the power was conferred upon the Secretary to establish a marketwide pool, as was done in Order 27, by virtue of which all producers of milk sold in the marketing area were to receive uniform prices. Thus it was stated without equivocation that there should be no discrimination between handlers or producers serving a given marketing area. Further, the Secretary was authorized to include in his regulatory orders auxiliary terms incidental to, not inconsistent with and necessary to carry out the specific authority granted. Finally, to guarantee against the very results which have been produced, Congress, after full consideration and discussion, provided that no milk order should prohibit the marketing "in that area of any milk or product thereof produced in any production area in the United States", and no restrictions were allowed to be placed thereon except those imposed upon all other milk in the area.

Section 927.83 of Order No. 27, here in issue, violates the uniform price requirements in Section 8c(5)(A) of the Act. The price obligations imposed by the Secretary upon a non-pool handler differ violently from those imposed upon a pool handler. Both the methods of pricing and the resultant prices are dissimilar, and serve to eliminate the non-pool handler from the market. The same question arose in the case of *Kass v. Brannan*, 196 F. 2d 791, C. A. 2 (1952), cert. den. 344 U. S. 891. The compensatory payment provisions of Order No. 27, which were substantially the same then as now, were held to be contrary to Section 8c(5)(A) of the Act and were, therefore, declared invalid. Both the majority and the dissenting judge in that case recognized that to be valid at all compensatory payments would need to bring about price uniformity among handlers.

The Act permits no distinction between pool and non-pool handlers, and directs the Secretary to accord uniform treatment to *all* handlers. This the Secretary has failed to do, and his discrimination renders Section 927.83 of Order No. 27 invalid.

The challenged provisions are not authorized by Section 8c(7)(D) of the Act, since they are inconsistent with and in conflict with the uniform price provisions of both sections 8c(5)(A) and (B). Similar arguments have been made in other cases where the Secretary has sought to exercise powers not conferred by Congress in 8c(5) of the Act. This Court has confined the Secretary's activities under 8c(7)(D) to those which are purely "auxiliary", and not contrary to those set forth specifically in Section (5)(A) (*U. S. v. Rock Royal Cooperative*, 307 U. S. 533; *Brannan v. Stark*, 342 U. S. 451), as did the Court of Appeals in *Kass v. Brannan*, *supra*. Section 8c(7)(D) confers no new powers upon the Secretary, nor does it extend or enlarge any of the specific powers granted him in 8c(5)(A).

Section 927.83 of Order No. 27 is in conflict with Section 8c(5)(G) of the Act which provides that no order shall pro-

hibit the marketing in the area of any milk produced in any production area in the United States. The charge imposed by the contested provision upon milk supplied non-pool handlers by farmers is of such magnitude that its entry into the marketing area is prohibited. No handler could possibly sell milk in the area which is priced to him at 5¢ to 6¢ per quart higher than to his pool plant competitors. In reality, then, the contested provision prohibits the flow of milk into the market from other production areas, and fosters monopoly. The pool plants in the market are effectively given exclusive rights to all the sales in it.

This Court dealt with a factual situation where an attempt was made to "obstruct the normal channels of interstate commerce" insofar as movements of milk were concerned. The Court held that it was ". . . the deliberate policy of the Congress to prevent federal officers from placing barriers in the way of the interstate flow of milk". *Hood & Sons v. DuMond*, 336 U. S. 525. Other attempts to use the machinery of farm legislation to foster monopolies and interfere with the free flow of commerce have come before the Supreme Court. This Court again dealt with one such an attempt in the case of *Denver Union Stockyards Company v. Producers Live Stock Marketing Association*, 356 U. S. 282, a case which arose under the provisions of the Packers and Stockyards Act of 1921. The Court there denied the right of a stockyard owner to make market agencies registering with it exclusive agents and thereby achieve a monopoly over the handling of cattle in its particular area.

The effect of Section 927.83 of Order No. 27 is to drive handlers with long established in-area sales and distribution out of the marketing area, and prevent new handlers from entering it, all for the benefit of a carefully defined group of handlers and producers. Even though Congress foresaw such a possibility and framed the Act to avoid it, the New York-New Jersey Milk Marketing Area is closed to all handlers and producers except those designated as pool plants and producers who ship their milk to pool plants.

The contested payments represent forced contributions to a pool, which are distributed among the farmers who supply pool plants, and who have no part whatsoever in producing the milk furnished by the farmers to non-pool plants for sale in the area. They are not *compensatory* payments by any definition, but are in fact penalties and were so described by the Court of Appeals in the case of *Kass v. Brannan, supra.*

It has been argued that the price uniformity requirements of Section 8c(5)(A) apply only to prices paid by pool handlers, and that Section 8c(5) of the Act has no relationship to non-pool handlers. If that premise is granted, in view of the plain statutory declaration that the Secretary may include no terms in an order other than those set forth in Section 8c(5), it follows that there is no authority in the statute to regulate non-pool handlers at all. The Petitioners make no such contention. They do assert, however, that as handlers selling milk in the New York-New Jersey Milk Marketing Area, they are entitled to be treated uniformly with all other handlers selling milk in the market, and to be free from discrimination.

Section 927.83 renders achievement of price uniformity between pool and non-pool handlers an impossibility. It is, therefore, invalid.

ARGUMENT

I. Material Facts

Lehigh Valley Cooperative Farmers, Inc., was organized in 1935, and qualified as a Capper-Volstead Cooperative. It is a farmers' cooperative composed of about 3,400 members, of whom approximately 900 ship milk to the Lehigh Valley plant located in Allentown, Pennsylvania. Its sales area encompasses the territory located within a radius of 35 miles of Allentown, Pennsylvania. This area covers the urban centers and environs of Allentown, Bethlehem and Easton, Pennsylvania, and Phillipsburg, New Jersey. (R. 693a.) This entire area has been recognized by the United States Census Bureau as one metropolitan or commercial area. The Cooperative has distributed fluid milk from its routes in this area for approximately 27 years. Its volume of fluid milk packaged and sold in the Phillipsburg, New Jersey area is approximately 8,000 quarts per day. (R. 304a.)

In the fiscal year 1956, the Cooperative handled slightly more than 184,000,000 pounds of milk, and somewhat more than this in subsequent years (R. 303a). The Petitioner has never called upon its producer members to retain milk on the farm, nor to divert milk to other outlets. When milk in excess of the Class I requirements is offered, it is accepted and manufactured into other products by the Cooperative. Thus, it handles all the surplus associated with its Class I sales (R. 307a-308a, 311a, 312a, 673a, and 892).

In the case of Petitioner's sales of bottled milk in the New Jersey area, the minimum prices fixed by the New Jersey Office of Milk Industry are and have been charged, and for sales made in Pennsylvania Petitioner has charged the prices established by the Pennsylvania Milk Control Commission. During the short periods of time when no minimum resale prices were fixed by the New Jersey Office of Milk Industry, Lehigh Valley charged the "going prices" which were the minimum prices fixed by the Pennsylvania

Milk Control Commission for sales in Allentown, Bethlehem and Easton, Pennsylvania.

Lehigh Valley is a handler under the provisions of Order No. 61, the Federal Order regulating the handling of milk in the Philadelphia Milk Marketing Area, and is subject to the applicable provisions of the New Jersey Office of Milk Industry and the Pennsylvania Milk Control Commission.

Lehigh Valley sells about five times as much Class I milk in the marketing area of Order No. 61 as in the marketing area of Order No. 27 (R. 305a). For this reason, it could not qualify as a pool plant under Order No. 27 from August 1, 1957 to September 1, 1958. There are no facts which have been established in this record to determine whether the Cooperative could have qualified as a pool plant under Order No. 27 from September, 1958 to the present time.

By virtue of the contested provisions of Order No. 27, Sections 927.83 and 927.84, commonly spoken of as "compensatory payments", and referred to by the Court in the case of *Kass v. Brannan, supra*, as "penalty payments", the Cooperative is required to pay into the Order No. 27 Producer Settlement Fund for distribution among producers shipping to pool plants between $15,000 and $20,000 per month, a total to July 31, 1961 of $617,454.22, an obligation imposed only upon Petitioners, and those similarly situated. This increased obligation amounts to between 5 and 6¢ per quart, for milk sold in Northern New Jersey, and would prohibit the flow of the Cooperative's milk into Phillipsburg, New Jersey, a market which it has served for some thirty years.

Suncrest Farms, Inc., is a licensed milk dealer in the Commonwealth of Pennsylvania, and a handler as defined by Federal Order No. 27. Petitioner buys, processes, bottles, manufactures and sells milk and milk products in the same area as Lehigh Valley (R. 249a). All its sales into New Jersey are in packaged form, classified as I-A under Order No. 27, and Class I under the Pennsylvania Milk Control Commission Orders. The processing and packaging function is performed in its plant in Pennsylvania, and delivery is made into the New Jersey area from this plant.

Suncrest operates under the jurisdiction of the Pennsylvania Milk Control Commission and is required to pay the minimum prices established in the applicable Orders of the Pennsylvania Milk Control Commission for the milk it sells, both in Pennsylvania and New Jersey. The Pennsylvania Milk Control Commission has authority to and does establish prices Petitioner must pay for all its Class I milk, including that sold in New Jersey. *Commonwealth v. Eisenberg Farm Products*, 306 U.S. 346, 352-353, and *Hood & Sons v. DuMond*, 336 U.S. 525, 530.

Historically and throughout the period August 1, 1957 to date, the minimum producer price established by the Pennsylvania Milk Control Commission and paid by Petitioner for Class I milk of either 3.5% butterfat or 4% has been at least equal to, and for the most part higher than, the comparable Class I-A price under Federal Order No. 27. As an example, during the month of September, 1957, the Pennsylvania Milk Control Commission established a price of $6.40 per cwt. for milk of 4% butterfat content sold as Class I milk in Pennsylvania and as Class 1-A milk in Phillipsburg, New Jersey. The Class 1-A price under Order No. 27 for the same month, for the same type of milk, delivered to a plant located in Easton, Pennsylvania, was $6.23. The compensatory payment for this month was $2.78 per cwt. which brought the price required to be paid by Petitioner to $9.18 per cwt. This is $2.95 per cwt. more than Order No. 27 dealers would be required to pay, who also sell milk in Phillipsburg, New Jersey. For the month of August, the price for milk delivered to Easton established by the Pennsylvania Milk Control Commission was $6.00 per cwt., and the price established by Order No. 27 was $5.94 per cwt. The Pennsylvania Milk Control Commission monthly and annual average Class I prices have been on an ascending curve since then, while the Federal Order 27 Class 1-A prices have been on a descending curve.

The testimony discloses that for the month of August, Petitioner returned to its producers $5.57 as a blend price for

all of the milk it purchased, and for September $6.21. These figures are in excess of the blend prices returned by pool handlers under Order No. 27 (R. 247a-248a).

It should be noted that Federal Order No. 27 plants can and do sell milk in Pennsylvania for which they pay Order No. 27 prices, which gives them a distinct advantage over Petitioner and others so situated.

Petitioner does not lay off its producers, nor divert its surplus milk to any Federal Order No. 27 plants. (R. 892). The compensatory payments required of Petitioner are approximately $2,000 to $2,500 per month, a total to July 31, 1961 of $108,767. It is apparent that Petitioner cannot make the compensatory payments demanded and continue to do business in Phillipsburg, New Jersey, a market which it has served for more than 15 years.

II. The Statutory Plan

A. The Statute

The Congress of the United States declared in the Agricultural Adjustment Act of 1933,[1] as amended and as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937,[2] that the disruption of orderly marketing in interstate commerce impairs the purchasing power of farmers, and destroys the value of agricultural assets. It was, therefore, declared to be the policy of Congress that the Secretary of Agriculture should have power to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers for such products, parity prices.[3] If the prices thus determined for a marketing area are not reasonable in view of the various economic factors affecting the market supply and demand for milk and its products, the Act directs the fixing

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[1] Act of May 12, 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750).

[2] Act of June 3, 1937 (50 Stat. 246) 7 U.S.C. 601 et seq.

[3] 7 U.S.C. 602(1).

of such prices as will reflect those economic factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest.[4] Congress delegated authority to the Secretary to hold hearings, and gather information and evidence upon which administrative orders might be issued.[5] The delegation of authority, due to the Constitutional limitations set forth by the Supreme Court in the case of *Schechter v. U.S.*,[6] and other cases, was made within well defined channels and accompanied by a clear statement of standards to be followed by the Secretary in exercising the delegated authority.[7]

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[4] 7 U.S.C. 608c(18). *United States v. Rock Royal Cooperative, Inc.*, 307 U.S. 533, 59 S. Ct. 933, 83 L. Ed. 1446 (1939).

[5] 7 U.S.C. 608c(3) and (4).

[6] *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495, 55 S. Ct. 835, 79 L. Ed. 1570 (1935).

[7] *United States v. Rock Royal Cooperative, Inc.*, 307 U.S. 533, at 575:

> ". . . Unlike the language of the National Industrial Recovery Act condemned in the A.L.A. Schechter Poultry Corp. Case (295 U.S. page 538, 79 L. ed. 1584, 55 S. Ct. 837, 97 A.L.R. 947), the tests here to determine the purpose and the powers dependent upon that conclusion are defined. In the Recovery Act the Declaration of Policy was couched in most general terms. In this Act it is to restore parity prices, § 2. Under the Recovery Act, general welfare might be sought through codes of any industry, formulated to express standards of fair competition for the businesses covered. *Here the terms of orders are limited to the specific provisions, minutely set out in § 8c(5) and (7).* While considerable flexibility is provided by §8c(7)(D), it gives opportunity only to include provisions auxiliary to those definitely specified." (Emphasis added).

The *Senate Report No. 1011* on the Act includes the following significant language:

> "To eliminate questions of improper delegation of legislative authority raised by the decision in *Schechter et al v. United States*, the provisions relating to orders enumerate the commodities to which orders issued by the Secretary of Agriculture may be applicable, prescribe fully the administrative procedure to be followed by the Secretary in issuing, enforcing and terminating orders, *and specify the terms which may be included in*

In the case of milk and its products, the statutory delegation and standards appear in Sections 8c(1) through (5) of the Act.[8] To guarantee that the delegation of power to the Secretary would be within proper constitutional limits, Congress provided in Section 8c(5) that orders pertaining to milk and its products were required to contain one or more of the terms and conditions described in Section 8c(5) and *no others*, except as provided in subsection 8c(7)(D) of the Act, where the Secretary was authorized to include terms incidental to, not inconsistent with, and necessary to effectuate the provisions of an Order specifically authorized in Section 8c(5).[9]

8c(5)(A), (B) and (C) contain the Secretary's authority over prices handlers shall pay, prices producers shall receive, and the method of payment thereof. (5)(A) permits the Secretary to classify milk in accordance with the form in which it is used, and fix or provide a method for fixing minimum prices for each classification which *all* handlers shall pay,[10]

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orders dealing with the enumerated commodities." 74th Cong. 1st Sess., May 3, 1935, Cal. Day July 13 (Emphasis added).

See also *Brannan v. Stark*, 342 U.S. 451, 72 S. Ct. 433, 96 L. Ed. 497 (1952). Justice Clark stated at footnote 16, page 465:

"The statutory provisions setting forth the terms which might be included in marketing orders were first enacted in an amendment to the Agricultural Adjustment Act in 1935. 49 Stat. 753. This enactment occurred shortly after the decisions of this Court in Panama Refining Co. v. Ryan, 293 US 388, 79 L. ed 446, 55 S. Ct. 241 (1935), and A.L.A. Schechter Poultry Corp. v. United States, 295 US 495, 79 L. ed 1570, 55 S. Ct 837, 97 ALR 947 (1935), placing limitations on the delegation of rule-making authority to administrative agencies. *With these cases specifically in mind, Congress set forth with deliberate particularity and completeness the terms which the Secretary might include in marketing orders.* HR Rep No 1241, 74th Cong., 1st Sess 8; S Rep No 1011, 74th Cong., 1st Sess. 8." (Emphasis added).

[8] 7 U.S.C. 608c(1) et seq.

[9] 7 U.S.C. 608c(7)(D). See *U. S. v. Rock Royal Cooperative, Inc., supra.*

[10] *Kass v. Brannan*, 196 F. 2d 791, C.A. 2 (1952), cert. denied, 344 U.S. 891.

subject only to adjustments for volume, grade and location, none of which factors are here involved.

Section 8c(5)(B) authorizes the Secretary to choose one of two methods by which producers delivering milk to handlers shall be paid. The first is known in the industry as the *individual handler pool* method, whereby all producers delivering milk to the same handler receive an average price computed by dividing the total of the class values of the milk received by the handler by the amount of the milk shipped to him by his producers. The second, commonly referred to as the *marketwide pool*, and the one in use in the New York-New Jersey Milk Marketing Area, permits the Administrator to create a pool composed of the total of the class values of all the pool milk and the payment to producers of an average or blend price, calculated by dividing the total use value by the amount of the milk in the pool. Under the marketwide pool system, any handler whose milk is disposed of at a use value less than the market average draws sufficient funds from the pool to enable his producers to receive the average market price, and any handler whose individual use value exceeds the market average contributes the overage to the pool.[11]

Section 8c(5)(C) contains the machinery necessary to establish the pool. Sections 8c(5)(E) and (F) apply specifically to cooperative marketing associations and are not here in issue.

The statutory plan contemplated that the Secretary of Agriculture would prescribe uniform minimum prices which all handlers would be required to pay for milk disposed of in a given marketing area, and uniform minimum prices all producers should receive for that milk, either on an individual handler pool basis or marketwide pool basis.[12]

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[11] 7 C.F.R. 927.75 et seq.

[12] See *United States v. Rock Royal Cooperative, Inc., supra,* at page 572:

> "The pool is only a device reasonably adapted to allow regulation of the interstate market upon terms which minimize

The plan was refined still further by the provisions of 8c(5)(D) and (G). 8c(5)(D) imposed a restriction upon a producer who was not a regular shipper to a handler during the 30-day period preceding the effective date of an Order. It was provided that for a period of approximately 2 months beginning with the first regular delivery by such producer, his milk should be priced at the lowest use classification price.[13] Thereafter, however, he became a full participant in the pool. With this exception, all producers shipping to all handlers were entitled to uniform prices for their milk.[14]

It is not beyond the mark to say that the paramount and overriding intent of Congress was that *all handlers* and *all producers* identified with the sales of milk in a given marketing area should be accorded uniform treatment insofar as prices paid by handlers and prices received by producers were concerned. And, in fact, equity demands no less.

Congress, having thus provided for uniform application of the advantages to be gained by the stabilization of milk prices in a given marketing area, then turned its attention to the safeguards necessary to afford equal protection and opportunity under the law. The Congressional intention in this regard is spelled out and clarified in Section 8c(5)(G), where the Secretary was directed to issue no order which would prohibit the marketing of any milk in a given milk marketing area that was produced in any production area in the United States. Congress was well aware that systems of statutory regulation can be used and misused to benefit one segment of the economic society at the expense of others, or unwittingly converted to the advantage of a few. Although the Secretary

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the results of the restrictions. It is ancillary to the price regulation designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing."

[13] See *Hood v. DuMond*, 336 U.S. 525, 544; 93 L. Ed. 865, 877 (1949).

[14] *Brannan v. Stark, supra*, at page 463.

was permitted to impose milk regulation on a regional basis from market to market, he was specifically directed not to develop milk orders which would prohibit milk produced in any production area in the United States from having its opportunity to be sold in any marketing area in the United States by virtue of any of the provisions in his Orders.[15] With this provision the statutory plan is complete. Its concepts are simple in nature and equitable. Complexities arise only when the Secretary leaves the confines of the fundamental purposes of the statute. The basic problem was recognized to be one of price, and no discrimination was permitted against any handlers or any producers.

B. Legislative History of the Act

The legislative history surrounding the enactment of this statute leaves no doubt as to the intention of Congress. In the early 1930's prices paid producers for milk had become seriously demoralized throughout the entire country so that the supply and quality of milk were seriously threatened. This Act was one of a number designed to cope with the economic chaos which had developed in American industry and agriculture.

In the case of milk, Congress felt that if minimum prices for milk were guaranteed, nothing further would be required, and the Act confers upon the Secretary no powers in the case of milk other than those pertaining to the establishment of minimum prices.

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[15] *Hood v. DuMond, supra*, at pages 539 and 544:

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any."

The Congressional intention is expressed in the debate on H.R. 8492, and in the House, Senate and Conference Committee Reports on the Bill. Representative Jones, Texas, was the Floor Manager for the Bill. Time and again, he states in answer to questions and in his supporting statement, that no barriers may be imposed under the Act to hinder the free flow of milk and milk products into the marketing area which will subsequently be established by its terms. He said, "There is nothing in the Bill that would authorize that. The Secretary may require that in crossing from one region to another that they comply with the same conditions which the farmers and distributors comply with in that region . . . He [the Secretary of Agriculture] cannot set up any trade barriers which would keep them out . . . The amendments require a uniform price and uniform set of conditions and fair distribution. In the first place, I do not believe we could give authority to set up these barriers. In the second place, the Bill does not do that."[16]

Representative Andreson, Minnesota, said, "This Bill . . . does not give the Secretary the power to set up any marketing areas or trade barriers to stop free flow in commerce of any commodity covered by the marketing agreement or order section. My fear was that dairy products produced in the Middle West would not be permitted to be sold in the large consuming areas of the East. This feature has been definitely eliminated from the bill . . . The farmers out in our section will have to meet the grade and the sanitary requirements of the state of New York or the other states, but there is nothing in the bill that stops free flow in commerce of any commodity within the United States."[17]

Representative Andresor stated further, "One of the things we have to contend with is the fact that every State, during this depression period, has been setting up barriers, in spite

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[16] Cong. Rec. Vol. 79, 74th Congress, 1st Session, 1935, Page 9462.

[17] *Ibid* 9480.

of the Constitution of the United States, to prohibit the introduction into another State of products that it raises in its own State. It is high time we set our foot down on that . . . this is the one place where we can very well afford to put an end to it . . ."[18]

In an abundance of caution, Mr. Andreson, so that there should not at some future time be any misconstruction of the language, offered an amendment to the bill, which was subsequently incorporated in the final enactment as Section 8c(5)(G). Representative Jones, in a discussion of the Andreson amendment, declared, "Mr. Chairman, I will state that I think that is the meaning of the language as we have it now, but I have gone over it with several members of the Committee at the gentleman's [Mr. Andreson's] suggestion. It is simply clarifying and I have no objection to the adoption of the amendment."[19]

Again, Mr. Jones answering a query from Representative Boilean, stated categorically that there was nothing in the Bill giving the Secretary of Agriculture or anyone else power to restrict the free flow of milk or any other commodity between the various states.[20]

C. The Contested Provisions of Order No. 27 Nullify the Statutory Plan Designed by Congress

Order No. 27 [21] which regulates the handling of milk in the New York-New Jersey Milk Marketing Area, is directly in issue in this litigation. Examination of its compensatory payment provisions shows that the Secretary of Agriculture disregarded the clearly stated intention of Congress.

The Secretary, despite the admonition to establish uniform use prices to be paid for milk sold in the marketing area by *all* handlers, created two classes of handlers: pool plant han-

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[18] *Ibid* 9493.
[19] *Ibid* 9572.
[20] *Ibid* 9572.
[21] 7 C.F.R. 927.1. et seq.

dlers, and non-pool plant handlers, both of whom sell fluid milk in the marketing area. Handler is defined (7 C.F.R. 927.7) *inter alia*, to include "any person who engages in the handling of milk or products therefrom, which milk was received at a pool plant, or at a plant approved by any health authority as a source of milk for the marketing area". The Secretary at the offset seemed to recognize the Congressional direction to apply the same regulations to all handlers. This broad definition, however, breaks into discriminatory and unreasonable classification under the delimiting definition of "pool plant" (7 C.F.R. 927.25-.29), since prices to be paid by pool plant handlers are computed by one formula (7 C.F.R. 927.65-.66) while payments by operators of non-pool plants are computed by another. The two formulae cannot produce uniformity except by sheer accident.

Pool handlers were made subject to the class prices fixed by the Secretary. The non-pool handler, on the other hand, was made subject to Section 927.83 of the Order, which imposed an obligation on him totally unrelated to that required of the pool handler. It is demanded that, in addition to the price he pays for milk, he make a penalty payment to the pool, measured by the difference between the Class III or manufactured price, and the Class I or fluid price established in the Order.[22] It is apparent that the Secretary's action was at complete variance with the plain provision of 8c(5)(A) that class prices for milk sold in the market shall be uniform as to all handlers. [23]

To be lawful and valid any price action with regard to a handler of milk must be within the authority granted in Section 8c(5)(A) of the Act. If there is no authority in that section, none can be found in any other section. 8c(5)(A) demands that uniform class prices be paid by *all* handlers, and no distinction is made in the Act among any who market milk in the area. The Secretary's right of classification, whatever it may be, does not entitle him to amend the statute

[22] C.F.R. 927.83.

[23] *Kass v. Brannan, supra.*

or set aside the legislative intention to deal with all handlers uniformly.

In Order No. 27, the Secretary has also by definition made a distinction between one set of milk producers and another. Sections 8c(5)(B)(i) and (ii) of the Act require that *all* producers shall be paid uniform prices for their milk sold in the marketing area. Albeit the method of payment may be either by means of a marketwide pool or an individual handler pool, nevertheless the handler's payments for milk must be uniform. The legislative history, *supra*, makes abundantly clear that this matter was of grave concern to Congress at the time the Bill was enacted. It was considered possible by some of the lawmakers that attempts would be made to discriminate against various groups of producers, located outside the marketing area. It was also the unequivocal determination of Congress that any milk which entered the market should return to the producers the minimum prices established in the order applicable to the marketing area within which the milk was sold, adjusted only by the costs of moving that milk to the market. Thus, the use of the phrase, "for the payment to all producers . . . of uniform prices . . . " has great significance.

Section 927.83 of Order No. 27 could scarcely be more inconsistent with the plain Congressional intention. By a requirement that handlers designated by the Secretary as non-pool handlers contribute the difference between the Class III and the Class I prices to the New York Equalization Pool on all milk sold within the marketing area, a group of producers who have nothing to do with the production of the milk thus sold in the market, receive a part of its value as a gratuity. If the producer who ships to a non-pool handler wishes to continue marketing his milk in the area, he will find that only a part of the value of his milk, i.e., the manufactured value, will be paid to him, and the remainder to the marketwide pool for the benefit of producers who had nothing to do with its production. This anomalous result is achieved by the

simple device of defining a *producer* as a farmer who produces and ships milk to a pool plant, and a *dairy farmer* as a farmer who does not ship milk to a pool plant. The plan is clearly discriminatory. The "producer" sells milk in accordance with one set of regulations and prices, and the "dairy farmer" sells milk under a different set of requirements and prices, even though both the "producer" and the "dairy farmer" furnish milk for the same marketing area.

There is no doubt as to the results that have been produced by the use of the compensatory payment and penalty plan. It has created an impregnable wall around federal milk marketing areas which prohibits the entrance of outside milk and outside handlers. It also precludes handlers from maintaining their historical sales position in the market. The entire structure of uniformity is destroyed by a compensatory payment provision in a marketing order. The producer of milk subjected to it will either be deprived of a part of the value of the milk to which he is justly entitled, or the handler will be forced to pay a price higher than other handlers with whom he must compete for sales in the area, as in the case here presented.

This device is, therefore, inconsistent with and directly contrary to the mandate of Sections 8c(5)(A) and (B), and no authority for its use is contained therein. Being inconsistent with and violative of these sections, it is not authorized by Section 8c(7)(D), which permits provisions to be included in an order which are "incidental" to the specific powers delegated in Section 8c(5) of the statute, but only if they are "not inconsistent with" and not repugnant to those provisions.

III. Section 927.83 of Order No. 27 Violates the Requirement of Uniform Prices in Section 8c(5) of the Act

Section 8c(11) directs the Secretary of Agriculture to issue orders applicable to the handling of various agricultural commodities on a regional basis, giving "due recognition to the

differences in production and marketing of such commodity or product in such areas."[1] Except in the case of milk it is provided that such orders shall be limited in their application to the smallest regional production areas or regional marketing areas which the Secretary finds practicable.

If we assume in this section of the argument that a properly designed compensatory payment provision is valid, it becomes important to determine the result sought to be achieved by the use of such payments. It will be demonstrated that Section 927.83 [2] fails to serve the purposes which agricultural economists, and the Secretary himself, ascribe to compensatory payments.

It has been stated that compensatory payments should be designed "to insure that unregulated . . . plants which sell milk within a regulated marketing area will be required to pay at least as much as those who are under the regulation," that such payments were "to protect handlers from indiscriminate competition" and that they should bring about " . . . an equality of opportunity between those in the pool under the regulation and those who are not." [3] Another economist described a compensatory payment as "an amount fixed by certain rules as nearly as possible to bring his raw material product cost up to that of competing handlers getting their milk from fully priced and pooled sources."[4] He stated categorically that, "The purpose . . . is to equalize the cost to handlers on milk that . . . comes from Order plants . . . [and] milk from other sources that comes into the marketing area for similar uses . . . " Such payments are "not for the purpose of keeping milk out of the market."[5]

In the case of *Kass v. Brannan*,[6] the Court of Appeals for the Second Circuit, dealing with the compensatory payment

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[1] 7 U.S.C. 608c (11).
[2] 7 C.F.R. 927.83.
[3] Dr. Leland Spencer, R. 661a, 665a.
[4] Dr. C. W. Pierce, R. 392a.
[5] Dr. C. W. Pierce, R. 889.
[6] 196 F.2d 791 (1952) cert. denied, 344 U.S. 891.

question under Order 27, set forth a statement of the purpose of compensatory payments at pages 793 and 794 of its opinion. The opinion holds:

> ". . . In brief these auxiliary provisions provide that handlers of non-pool milk and non-pool milk products disposed of in the marketing area are required to make payments to producers, through the producer settlement fund. The purpose of these provisions is, in the words of Mr. Weldon, a witness at the promulgation hearing, 'to insure that the minimum cost [of non-pool milk, cream, etc.] to handlers is the same as the regular class price to handlers of milk received at pool plants. * * * ' The effect is to add an additional cost to the original price of the non-pool milk or milk product which is paid by handler not to the seller or original producer, but to the regular suppliers of the New York market who did not deliver the milk or milk products to him . . ."

In that case Judge Learned Hand wrote a dissenting opinion, but expressed agreement with the obvious purpose of compensatory payments subscribed to by the majority of the court and all persons familiar with the problem of peripheral milk. At page 798, Judge Hand made this observation:

> ". . . Another method was to impose upon a 'non-pool' handler the same cost that 'pool' handlers must pay, thus eliminating any inducement to poach, so to say, upon the local 'pool.' The provisions in suit were promulgated to effect this purpose; and *I shall assume that they can be defended only on that ground* . . ." (Emphasis added.)

It was not until the United States Court of Appeals for the Third Circuit handed down its opinion in the instant case [7] that a contrary opinion concerning the purpose of compensatory payments was expressed by an Appellate Court. Judge McLaughlin flatly disagreed with the holding of the *Kass* case,[8] and held that use of the *Kass* formula of equaliza-

[7] 287 F.2d 726 (1961), R. 897.

[8] *Ibid.*, R. 902.

> "This interpretation misconceives the plain language of the section and suggests a policy not contemplated by Congress."

tion "would be repugnant to the *express* purpose set forth in the Act itself, i.e., regional regulation to secure a stable market and parity prices for producers." The Court's theory was that the Secretary of Agriculture was authorized to distinguish between pool and non-pool plants and that compensatory payments were "designed to compensate the pool for the loss of the Class I fluid milk utilized . . . (and) protect the uniform blend price in the marketing area."[9] It clearly sustained the use of compensatory payments in Order No. 27 to close the New York market to all producers and handlers located outside the New York Marketing Area. Its opinion represents the outer extremity to which protection of local handlers and producers can be extended. It excludes all other handlers and producers throughout the rest of the United States,[10] and even drives from the market handlers and producers who have been a part of it for more than a quarter of a century. The Court misinterpreted the intention of Congress entirely. It is clear that Congress desired to protect the local area from the influx of cheap milk, but not to close the market; to guarantee fair competition, but not to grant a monopoly.

The Hearing Examiner in the administrative proceeding, an independent referee experienced and familiar with controversies under the Agricultural Marketing Agreement Act, who presided at the administrative hearings in both the *Kass* case and the present case, and the District Court below, recognized that uniformity was the end to be achieved by compensatory payments,[11] and that the contested provisions failed in this purpose.

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[9] *Ibid.*, R. 903.

[10] *Ibid.*, R. 906.

> " . . . its [§ 8c(5)(A)] only valid construction is that its application is limited to all pool or fully regulated handlers for the regional marketing area . . . "

[11] "17. There is testimony in the record of the following:

(a) The purpose of compensatory payments is to see that unregulated plants selling milk within the area pay at least as much as regulated plants; to protect handlers and producers against cut

The question then becomes whether Section 927.83 of Order No. 27 by which the Secretary imposed a payment measured by the difference between the Class I fluid price and the Class III manufactured price upon Petitioners, non-pool handlers under the terms of Order No. 27, was discriminatory and contrary to the statutory requirement of uniformity and in conflict with the purposes sought to be achieved by such payments.

Section 8c(5)(A) authorizes the Secretary to classify milk and fix, or provide a method for fixing, minimum class prices which all handlers shall pay for such milk, and which must be uniform as to all handlers. As the Court in the *Kass* case says at page 795: "The immediate object of the Act is to fix minimum prices for the sale of milk by producers to handlers".[12]

There is no distinction in the statute between pool and non-pool handlers. The Secretary, by the use of certain formulae, established a method for fixing minimum class prices for pool handlers. He just as certainly fixed a minimum Class I price for non-pool handlers by providing in Section 927.83 [13] that such handlers would be required to add to the price actually paid for milk an additional amount measured by the difference between the Order No. 27 Class III and Class I-A prices, such amount to be paid into the New York Market Equalization Pool. In the case of pool handlers, application of the formulae produces varying prices from month to month. Similarly, use of the method specified for non-pool handlers produces varying prices from month to month. Despite the different methods employed, the Statute demands that the resulting prices or costs to both pool and non-pool handlers be uniform. The fundamental statutory standard of uniformity of pricing applies to all *handlers*.

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rate milk; to give equality of opportunity; and to permit, by partial regulation, an outside dealer selling milk both in and out of the area to operate on an equal footing with fully regulated dealers (P.H.R. 15,020-15,029, 15,240-15,244)." R. 48a.

[12] *Kass v. Brannan*, 196 F.2d 791, 795, C.A. 2 (1952).

[13] 7 C.F.R. 927.83.

The statute does not prescribe meaningless standards for the Secretary. By this section, Congress intended to provide that the minimum prices payable by all handlers for milk utilized in the marketing area should be uniform so that no one group of handlers would enjoy either an unfair advantage or suffer an unfair disadvantage.

To avoid any ambiguity subsection 8c(5) contains the significant statement that the terms and conditions specified in the section "and no others" may be included in an order. Nowhere in section 8c(5) or any other section of the Act can authorization be found for the inclusion of a compensatory payment provision in a milk order which will advantage or disadvantage any handler of milk in the area.

The *Kass* case deals carefully and definitely with the statutory requirement of uniformity. At page 796, the Court states the basic objection to the "compensatory" payment provision of Order No. 27:

> "*We think that the payments required by Section 927.9(h) of the Order are part of the 'minimum price' as that term is used in section 8c(5)(A) of the Act.* The price of non-pool cream or condensed milk to a New York handler is in reality composed of two elements: (1) the initial cost, i.e., the amount paid to the seller, and (2) the amount of the penalty required to be paid under the Order. Section 927.9(h)(2)(ii) assumes that the initial cost of the non-pool cream and condensed milk will be the Class IV-A (butter) price under the New York order. If this assumption were true, the minimum prices of pool and non-pool cream and condensed milk would be the same and would satisfy the requirement imposed by section 8c(5)(A) that 'Such prices shall be uniform as to all handlers . . .' *However, there is no substantial evidence in the record of the promulgation hearings which would indicate that the initial cost of non-pool cream and condensed milk would be the New York Class IV-A price. In fact, the only evidence bearing directly on this question supports the conclusion that the initial cost would be more than the New York Class IV-A price. Therefore, the result of the exaction of a penalty computed on the basis of the New York Class IV-A price rather than the actual*

cost to the handler is a price discrimination between a handler who purchases non-pool milk products and one who purchases pool milk products, although each makes the same use of such products in the New York Marketing Area. This in our opinion is contrary to the requirement laid down in section 8c(5)(A) that the minimum prices for each use classification shall be uniform as to all handlers.". (Emphasis added.)

An examination of the prices at which milk is available to non-pool handlers, such as Petitioners, for milk disposed of by them in the marketing area is necessary to determine whether the standard of uniformity among handlers has been violated and to what extent. The Findings of the Hearing Examiner in the administrative hearing under Section 8c(15)(A) are clear on this point. He found that in the Allentown-Easton-Bethlehem, Pennsylvania area "the competitive unregulated price of milk . . . is the Order No. 27 blend, or slightly higher (13,401, 14,107, 14,983-14,987, 15,240, 15,269, 15,346, 15,371-15,373, 15,544)," and that "Milk is bought for fluid use in the unregulated and semi-regulated areas in and near Northern New Jersey at slightly above the Order No. 27 uniform price (14,993)."[14] He concluded that the evidence in the promulgation hearing was that the price at which unregulated milk was available to Petitioners was not the Order No. 27 Class III price, but the Order No. 27 blend price or slightly higher.[15] The blend price, being an average market price, is always substantially higher than the Class III price.

The milk marketing specialists and economists testified in the Promulgation Hearing that the prices paid by handlers outside the area for milk sold into the area were the market blend price or something in excess thereof and that milk was not available to handlers at the Order No. 27 Class III price.[16] The Secretary himself in his Amendatory De-

[14] R. 49a.

[15] R. 55a.

[16] Dr. Dorris D. Brown, R. 598a; Dr. Leland Spencer, R. 653a-655a; Dr. Edmund Vial, R. 667a.

cision recognized these facts and conceded that in the case of the Allentown-Easton area prices required to be paid by producers were higher than the New York Order blend price.[17] Petitioners' pay prices are *much* in excess of the blend or average Order No. 27 price.

The District Court below found:

> "The government cannot argue (nor has it attempted to argue) that the total cost to the plaintiffs of the liquid milk which they sell in northern New Jersey is equal to the cost to its competitors. There is uncontroverted evidence to prove that the cost of raw milk to the plaintiffs is substantially higher than the Order No. 27 uniform Class III price classification, so that the *total* cost to the plaintiff handlers (when we include the compensatory payment based upon the difference between the uniform Class I and Class III price) will be in excess of the cost to fully regulated pool plant handlers. This is exactly what Judge Swan said § 608c(5)(A) of the Agricultural Marketing Agreement Act prohibited. *Kass v. Brannan, supra.*"[18]

The Court relied in part upon a misconception of Section 8c(5)(B)(ii) to support its limited definition of handler and producer in Section 8c(5)(A). The provisions of Section 8c(5)(B) are completely satisfied by imposing all of the pricing and pooling provisions of Order No. 27 upon producers' milk sold in the marketing area through any and all handlers. This method was approved in the *Rock Royal* case. In that case the Court discussed milk sold in the marketing area as priced milk and milk sold out of the area as unpriced milk, and held at page 566: "We are of the view that there is no discrimination by reason of this situation." In the present case, there is no unpriced milk whatsoever, as it is priced by the Pennsylvania Milk Control Commission and Federal Order No. 61. This subjects Petitioners to an even greater inequity than that in the *Rock Royal* case.

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[17] R. 708a.

[18] R. 225a.

Inasmuch as the concept of pool and non-pool handler was something contrived by the Secretary after the Act had been passed by Congress, there is no basis for the assertion by the Court below as follows:

> "But there is not the slightest indication that Congress used the language of Section 8c(5)(A), with the thought of providing for equalized costs between pool and non-pool handlers. . . ." [19]

There is certainly no reason to believe that Congress could anticipate that the Secretary would so boldly disregard the legislative intention.

In view of these facts, the District Court held the compensatory payment provision a violation of the requirement of uniformity of pricing in the Agricultural Marketing Agreement Act.

The Court below, in the present case, treated as totally immaterial the facts found by the Hearing Examiner, not reversed by the Judicial Officer, and found by the District Court that the prices paid for milk by Petitioners were higher than those paid by its pool plant competitors. The Court reached its conclusion by holding that the Act, when it provided in Section 8c(5)(A) that for milk sold in the marketing area "such prices shall be uniform as to all handlers," in fact meant, "such prices need only be uniform as to all pool handlers."

The Court of Appeals made no attempt to distinguish the holding of the *Kass* case, *supra*. It disposed of that case by merely stating its disagreement.

Granting the contention, pro arguendo, that Section 8c (5)(A) imposes the standard of uniformity only with reference to pool handlers and that 8c (5)(B) provides for uniform payments only to producers who ship their milk to pool plants, it must be inquired what standards do control the Secretary's regulation of the prices or costs of milk for non-pool handlers, and in what section of the Act such standards

[19] R. 904.

appear. Once the standard of uniformity in Section 8c(5)(A) is held inapplicable, the argument must be that the Secretary has full power to regulate non-pool handlers without reference to any standards whatsoever. This would be a rejection of the principle set forth in the case of *United States v. Rock Royal Cooperative, Inc., supra*, where this Court affirmed that the delegation of legislative authority in the Agricultural Marketing Agreement Act was valid *because of the precise standards appearing therein.*

The only possible conclusion must be that Congress intended precisely what it said, i.e., that minimum price regulations could be imposed upon all handlers connected with the market, but always in accordance with the standard of uniformity. There is no basis for the Secretary's qualification of the phrase "uniform as to all handlers" and his interpretation that uniformity has no application to "some" handlers. It appears, therefore, that the imposition of the "compensatory" payment provisions of Order No. 27 upon Petitioners and other handlers similarly situated, is in direct violation of the uniformity requirement in Section 8c(5)(A), as it was in the *Kass* case.

Counsel for Respondents will argue that Section 8c(5) does not require payment of minimum prices for milk received from "dairy farmers" at non-pool plants and that the Statute differentiates between a handler of milk receiving milk from "producers at a pool plant" and a handler receiving milk from "producers at a non-pool plant". In the *Kass* case, at p. 795, the Court said:

> ". . . The Act itself does not define 'producers' but it is clear from the context that the term refers to dairy farmers who supply the milk which the handlers market . . ."

The Statute uses the words "farmer" and "producer" interchangeably.[20] The concern of Congress was for all farm-

[20] e.g. The declarations of conditions and policy, 7 U.S.C. 601 and 602, refer to "purchasing power of farmers" and "prices to farmers".

ers, not some group artfully described as "producers" by the Secretary. The Court in the *Rock Royal* case, *supra*, at pages 543-546, quotes Sections 1 and 2 of the statute with its reference to "farmers" at an early point in its opinion, when passing upon the validity of Order No. 27. Consequently, at page 547, in speaking of the same group of persons, it uses the term "producers". In the case of *Stark v. Wickard*,[21] the United States Supreme Court speaks of "farmers producing milk", or "dairy farmers" as producers. When the case again came before the Supreme Court, involving identically the same litigants in the case of *Brannan v. Stark*,[22] Justice Clark spoke of the moving parties as "dairy farmers", and later at page 453, in speaking of the same persons, used the word "producers". It is, therefore, evident that the Supreme Court and Congress, in using the words "farmers", "dairy farmers" and "producers" were referring to the same persons.

The Secretary of Agriculture has no authority to change, limit or expand the definition of a word appearing in the statute, [23] and as previously pointed out in the *Kass* case, *supra*, the expressions "producer" and "dairy farmer" were used synonymously.

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[21] *Stark v. Wickard*, 321 U.S. 288, 88 L. Ed. 733 (1944).

[22] *Brannan v. Stark*, 342 U.S. 451, 96 L. Ed. 497 (1952).

[23] *Social Security Board v. Nierotko*, 327 U.S. 358, 368, 90 L. Ed. 718, 727 (1946):

> "The Social Security Board and the Treasury were compelled to decide, administratively, whether or not to treat 'back pay' as wages; and their expert judgment is entitled, as we have said, to great weight. *The very fact that judicial review has been accorded, however, makes evident that such decisions are only conclusive as to properly supported findings of fact.* Both Hearst Publications, (322 U.S. 131, 88 L. Ed. 1184, 64 S. Ct. 851) and Gray v. Powell, (314 U.S. p. 411, 86 L. Ed. 309, 62 S. Ct. 326), advert to *the limitations of administrative interpretations. Administrative determinations must have a basis in law and must be within the granted authority. . . . An agency may not finally decide the limits of its statutory power. That is a judicial function.* Congress used a well

If the Secretary's contention were accepted, it would mean that he could designate as pool handlers those whose Class 1-A disposition in the area must be at least 85% of their total receipts of milk, and that all other milk coming into the

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understood word—'wages'—to indicate the receipts which were to govern taxes and benefits under the Social Security Act. There may be borderline payments to employees on which courts would follow administrative determination as to whether such payments were or were not wages under the act.

"We conclude, however, that the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits. This is a ruling which excludes from the ambit of the Social Security Act payments which we think were included by Congress. *It is beyond the permissible limits of administration interpretation.*". (Emphasis added).

Addison v. Holly Hill Fruit Products, 322 U. S. 607, 617, 88 L. Ed. 1488, 1496 (1944):

"We should, of course, be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. . . .

"'The natural meaning of words cannot be displaced by reference to difficulties in administration' . . . For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense . . .

"After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.

". . . Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation' . . ."

area through non-pool handlers would be subject to "compensatory" payments, which the Government contends are not controlled by Section 8c(5)(A) of the statute. The handlers designated as pool plants under this definition might only furnish the market with a small fraction of the fluid milk. Therefore, the Secretary would be regulating the vast majority of the fluid milk in the market without any standards whatsoever, completely ignoring the uniformity clause as it appears in the statute. Such a construction would do violence to the intent of Congress, and lead to an absurd result.

If the Opinion of the Court below is to prevail, the word "handlers" appearing in Section 8c(5)(A) is synonymous with the words "pool handlers". On this premise, a non-pool handler would not be subject to any type of regulation, inasmuch as the statute would not then deal with non-pool handlers. It is obvious that Congress meant the word "handlers" to cover all types of handlers. This conflict concerns the fundamental question of whether delegation of power to the Secretary of Agriculture is limited by the intent of Congress, or by the views of the Secretary as to the desirability of his action. The Court in the *Kass* case, and this Court in the cases of *Rock Royal* and *Brannan v. Stark, supra*, determined that which Congress intended. The Court below in the instant cases seemed to be more persuaded by the desires of the Secretary.

It is evident that Congress made no distinction between dairy farmers who ship milk either to pool or non-pool handlers. The Opinion of the Court below, if correct, would exclude from the operation of the statute all non-pool handlers and all producers who ship to or supply non-pool handlers. That being so, the Secretary could exercise no regulation, control or supervision over them. Petitioners do not claim such an exclusion. They do contend, however, that such regulations as may be promulgated by the Secretary of Agriculture shall be uniform as to prices and costs. The *Kass* case so held; the Court below flatly disagreed.

IV. The Challenged Provisions Are not Authorized by Section 8c(7)(D) of the Act

Inasmuch as the provisions of Order No. 27 here under attack are in direct contravention of the requirement of uniformity in Sections 8c(5)(A) and(B) of the Agricultural Marketing Agreement Act, they are not saved by Section 8c(7)(D). This Section authorizes the Secretary to include as terms in a milk order those "Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order".[1] The important qualification is that the auxiliary provisions thus authorized must be consistent with the terms and conditions specifically sanctioned in the statute. Compensatory payments are inconsistent with the requirement of uniformity of prices and costs to handlers and can, therefore, not be valid under either Section 8c(5) or Section 8c(7).

Any finding by the Secretary as to the necessity for such a provision is no substitute for statutory authority, here lacking. A case in point is *Federal Power Commission v. Panhandle Eastern Pipeline Co.*, 337 U. S. 498, 93 L. Ed 1499, (1949). The F. P. C. is given wide powers over the "transportation or sale of natural gas subject to the jurisdiction of the Commission", including the incidental power to do things appropriate to carry out the Federal Power Act (p. 508). The Commission contended that it therefore had the power to approve or disapprove transfer of certain leases over natural gas reserves owned by Panhandle. Extensive administrative findings were made that, since natural gas is the "lifeblood" of a pipeline system, a company could, by disposing of its reserves, render itself unable to continue service and this without the Commission's consent. The Court squarely held that this alleged necessity of protecting the Commission's grant of authority was no substitute for the failure of Congress to grant additional authority (pp. 515-516):

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[1] 7 U.S.C. 608c(7)(D).

"If the Commission is of the opinion that it should have power to control the disposition of leases by natural-gas companies, it is authorized to call the attention of Congress to that fact."

A similar argument was made by the Secretary in the *Kass* case, *supra*. The Court rejected the argument and held that "... the penalty payments ... are inconsistent with ... 8c(5)(A) and therefore cannot be justified under section 8c(7)(D)".[2]

In *Brannan v. Stark*, this Court dismissed a contention that a contested provision of an order was authorized by 8c(7)(D), where it was claimed by the Secretary that the provision in question was fundamental and crucial to the operation of the Order.[3] In the Opinion of the Court of

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[2] "Consequently, the challenged provisions of the order under which the penalty payments were exacted are inconsistent with the terms and conditions specified in section 8c(5)(A) and therefore cannot be justified under section 8c(7)(D). As Mr. Justice Clark remarked in construing subsection (7)(D) in *Brannan v. Stark*, 342 U.S. 451, 72 S. Ct. 433, 439: 'Finally, the provisions cannot be incidental to the enumerated terms and conditions since they are inconsistent therewith.' And because of such inconsistency the court found it unnecessary to determine whether the provisions there under attack were ''necessary to effectuate the other provisions'' of the Order'. Although Brannan v. Stark is not a precise authority for the case at bar, we think it tends to support our decision.

"Since we rest decision on the ground that the provisions of section 927.9(h) of the order are inconsistent with the terms specified in paragraph (A) of section 8c(5), it is unnecessary to discuss other contentions of the parties." *Kass v. Brannan*, 196 F.2d, 797.

[3] "Section 8c(7) authorizes a congeries of general terms which may be included in all marketing orders, including those dealing with commodities other than milk and milk products. The Secretary claims authority for the provisions in question is given by the last paragraph of this omnibus subsection, a paragraph authorizing the inclusion of auxiliary provisions 'incidental to • • • the terms and conditions specified in subsections (5), (6) and (7).' Yet it is claimed that the contested provisions are of such basic importance that their validity may be crucial to the success of the

Appeals for the District of Columbia in that same case, it was pointed out that no new powers could be created by this section of the Act, nor could power specifically given be enlarged.(4)

In the *Rock Royal* case, *supra*, this Court limited the scope of section 8c(7)(D) of the Act to the purposes and area obviously intended by Congress, when it said only provisions auxiliary to those definitely stated were permissible under 8c(7)(D). The specific terms permitted to be included in a milk order set forth in section 8c(5) contain none to which the contested compensatory payment provision can be "auxiliary". In fact, the disputed provision is in direct conflict with the uniformity of class price requirement set forth therein.

Even though Section 8c(7)(D) also contains the word "necessary", this avails the Secretary nothing. The purpose of compensatory payments, as appears from the record, is to protect pool handlers from an invasion of their market by non-

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whole milk marketing program. We do not think it likely that Congress, in fashioning this intricate marketing order machinery, would thus hang one of the main gears on the tail pipe." *Brannan v. Stark*, 342 U.S. 451, 462; 96 L. Ed. 497, 606 (1952).

(4) "Whether the power to provide this payment to cooperatives is 'incidental' depends, of course, upon the meaning of that word as used here. The definition given in decisions has varied according to the situation and the statute or instrument to be construed (20 Words and Phrases, pp. 418-434). Probably as good a definition as any, in our situation, is 'Certainly, an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted' (First National Bank v State of Missouri, etc., 263 U.S. 640, 659, 44 S. Ct. 213, 216, 68 L. Ed. 486). By such definition, this payment is not authorized to carry into effect the powers granted the Secretary under the Act *but is opposed to the express requirement of uniform prices to producers subject only to the deductions and differentials set out in the Act.*

"That this payment is not 'not inconsistent' is determined by what has last been above stated." *Brannan v. Stark*, 185 F.2d 871, at 882 (1950). (Emphasis added.)

pool handlers who may be in a position to acquire milk supplies at less than the minimum prices required to be paid by pool handlers. Again the record shows that the price of milk available to non-pool handlers in this area is something higher than the New York Order blend price which dictates that the rate of compensatory payment set forth in the contested provision is much in excess of that which would be "necessary" to equalize the milk costs of pool handlers and non-pool handlers. Accordingly, the statutory requirement of "necessary to effectuate the other provisions of such order" is not met.

The Opinion of the Court of Appeals in the case at bar apparently upholds the validity of the compensatory payment provisions in Order No. 27 on two principal propositions. First, Section 8c(5)(A) of the Act and its requirement of uniform prices for all handlers has no application to Petitioners, since they are non-pool handlers. Secondly, the Court holds that the provisions in question are authorized by Section 8c(7)(D) as incidental to and necessary to effectuate the other provisions of the Order. Price regulation of handlers cannot be achieved by application of 8c(5)(B) through (G), but only under 8c(5)(A). Yet, the Court below says that even this paragraph has no bearing on or relevance to the handler price-fixing function implicit in compensatory payment provisions. If Section 8c(5)(A) is not relevant to the compensatory payment provision, the question immediately arises: what term of the Order whose provisions are limited specifically to those contained in 8c(5)(A) through (G) can the compensatory payment provision be incidental to, not inconsistent with and necessary to effectuate?

The Court has held that the standard of uniformity in 8c(5)(A) is not binding upon the Secretary in the formulation of a compensatory payment provision. If not, it is then fair to inquire, what standards do govern the exercise of this authority by the Secretary? The Court appears to hold that Section 8c(7)(D) itself is the enabling section, from which the Secretary draws the authority necessary to issue the provisions

in controversy. This section obviously contains no standards. The Opinion of the Court below leads to the inescapable conclusion that the Secretary has power and authority to regulate the actions, and particularly the prices, which bind non-pool handlers without any legislative or statutory standards whatsoever. This result is in direct conflict with the principle, followed consistently by the Supreme Court of the United States, that a delegation of legislative power in a statute without proper standards is a violation of the Constitution of the United States.

The Opinion of the Court of Appeals in the *Kass* case avoids the indefensible results reached by the Court below in this case. In *Kass*, the Court held that the Secretary's regulatory power over handlers had to be based on Section 8c(5)(A). Consequently, it had to meet the standard of uniformity. Failing that, it was inconsistent, in violation of the statute and had to fall. The Court there recognized that no new or enlarged powers could be exercised by the Secretary on any authority delegated to him by 8c(7)(D).

V. Section 927.83 of Order No. 27 is in Conflict with Section 8c(5)(G) of the Act, Prohibits the Flow of Milk and Fosters Monopoly

In the *Kass* case, the Court of Appeals declared that the only proper limitation upon the sale of milk in the marketing area by non-pool handlers should be that required to equalize the costs of pool and non-pool handlers, thereby protecting the price structure established in the Order. Any limitation beyond that, the Court held, was a penalty upon the non pool handler and his producers, and invalid.[1]

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[1] Judge Learned Hand, dissenting in the *Kass* case, did not eliminate the need for uniformity; he merely objected to the precise standards by which the Secretary's rules were held by the majority to be circumscribed. "[I]t was not necessary that in application they should go not a jot beyond the exact purposes for which they were intended." 196 F. 2d 791, 798.

In the present case the disparity in prices is many times more aggravated than in the *Kass* case, and prohibits the entry of milk into the marketing area in direct violation of 8c(5)(G) of the Act.

This Court dealt with an analagous situation in the case of *Hood & Sons v. DuMond*, 336 U.S. 525, 93 L. Ed. 865 (1949) and clearly set forth the basic purpose and intention of Congress as expressed in paragraph 8c(5)(G). That case dealt with an action of the State of New York denying Hood a permit to buy milk supplies from New York producers for shipment into the Boston area. The justification was that the action was taken to protect local economic interests and that such restraint on interstate commerce did not violate the commerce clause of the Constitution, because the state regulation was a part of the federal regulatory scheme. The Court rejected this contention at pages 544-545. In discussing Section 8c(5)(G), it was stated:

> "These sections and [Senate and House] reports indicate that it is the deliberate policy of the Congress to prevent federal officers from placing barriers in the way of the interstate flow of milk. * * * The purpose as expressed in § 1, 7 U.S.C.A. § 601, 2 FCA title, § 601, is to avoid conditions which burden and obstruct the normal channels of interstate commerce. The object of the federal program to raise and stabilize the price of products was to stimulate interstate commerce. The order of the Commissioner avows itself to have the opposite effect. It can claim neither federal sponsorship nor congressional sanction."

By the use of compensatory payments sales in the New York-New Jersey Milk Marketing Area have become the exclusive domain of local handlers and the group of producers who supply them. The regulation creates, fosters and perpetuates monopoly. The dominant cooperative in the market has become gigantic in size and powerful enough to tailor the provisions of the Order to protect its preferred position. It is no coincidence that it supports the validity of the preferential system with such zeal.

It is not unusual for attempts to be made to subvert the machinery of farm legislation to protect the interests of a few. The Supreme Court dealt with such a problem in the case of *Denver Union Stock Yard Company* [2] which arose under the provisions of the Packers and Stockyards Act of 1921. In that case, the Court invalidated a regulation issued by the stockyard company providing that no dealer engaged in business at the Denver Stockyard might solicit any business for other markets or endeavor to secure customers for livestock elsewhere, or in any manner divert or attempt to divert livestock from the Denver Stockyard to any other stockyard. Dealer was defined in the Act as a market agency, and it was provided that it was the duty of every market agency "to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard". The Court pointed out that the words "at such stockyard" meant at every stockyard where that market agency was registered, and that the regulations "bar both the market agency and the stockyard from performing their statutory duty".

A market agency registered at Denver was prohibited by the regulations from furnishing producers in the Denver area stockyard services at Kansas City or any other stockyard where the agency was also registered. It was a clear case in which the Denver Union Stockyard Company attempted to create a monopoly by misusing the statutory powers set up in the Packers and Stockyards Act. Justice Douglas characterized the stockyard company's argument thus:

> "The argument contra is premised on the theory that stockyard owners, like feudal barons of old, can divide up the country, set the bounds of their domain, establish 'no trespassing' signs, and make market agencies registering with them their exclusive agents . . ." [3]

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[2] *Denver Union Stock Yard Company v. Producers Livestock Marketing Association*, 356 U.S. 282, 2 L. Ed. 2d 771 (1958).

[3] *Ibid.*, page 288.

The Court quotes with approval the Opinion of the late Chief Justice Taft in *Stafford v. Wallace*, 258 U.S. 514, 66 L. Ed. 735, where it was said:

> " 'The object to be secured by the act is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still as live stock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.' "[4]

The Court disposed of the argument that the economics of the business had changed and that the contested regulations were required in view of modern developments, by saying:

> "If the Act does not fit the present economics of the business, a problem is presented for the Congress. . . .
> "We take the Act as written. As written, it is aimed at all monopoly practices, of which discrimination is one."[5]

The injustice wrought by the Secretary's use of the compensatory payment provisions would be serious enough if it did nothing more than prevent new handlers from marketing their supplies of milk in the Milk Marketing Area as defined by the Secretary. When, in addition to that, it actually drives handlers with long established sales and distribution out of the Marketing Area for the benefit of a carefully defined group of handlers and producers, its true motivation is unmasked.

VI. Petitioners Are Not Estopped from Challenging the Compensatory Payment Provisions of Order No. 27.

The Petitioners became subject to Order No. 27 by virtue of the amendment of August 1, 1957. The order granted

[4] *Ibid.*, page 289.
[5] *Ibid.*, page 289.

handlers the option, subject to certain conditions, of being either a pool or a non-pool plant, i.e., fully regulated, or subject to the compensatory payment requirements. At this time a handler had a non-pool, compensatory payment status automatically unless he affirmatively elected pool status. Petitioner Suncrest, having not elected pool status, was classified as a non-pool plant, and billed for compensatory payments. Petitioner Lehigh Valley, since it sold a larger volume of milk in the Philadelphia Marketing Area than in the Order No. 27 area, could not elect to be a pool plant. Subsequently, the Secretary issued an amendment effective September 1, 1958, which provided that handlers with the necessary qualifications should have pool plant status, unless they affirmatively elected non-pool status.

The Secretary has argued that inasmuch as Petitioners exercised an option to be non-pool plants in the reports required to be filed by the Administrator of Order No. 27, they were estopped from challenging the validity of the provisions to which their option subjected them. There is no validity in this contention. The Petitioners have at no time exercised a free option. They were directed by the United States District Court to file the reports. These reports required that the Petitioners be either pool plants or be subjected to compensatory payments. Consistent with the legal position asserted in the then pending (15)(A) review proceedings, Petitioners chose not to be pool plants. The Petitioners do not admit that other provisions of the Order which would apply to them, if they were pool plants, are valid; since they are not under those provisions they are not aggrieved by them, and have not and cannot question their validity. The administrative review proceedings were filed in good faith by Petitioners on the first day permitted by law, and Petitioners have diligently pursued their rights under Sections (15)(A) and (15)(B). It would render the right of judicial review meaningless if Petitioners were precluded from testing a provision to which they were involuntarily subjected under these circumstances.

The 1958 amendment was issued while these cases were pending, and seems to have been an attempt to render it im-

possible for these handlers to argue the validity of the compensatory payment provisions which they had theretofore attacked. The argument was immediately offered by the Secretary that Lehigh Valley and Suncrest, having elected to retain non-pool status rather than pool status, had by their own voluntary choice estopped themselves from questioning the validity of the compensatory payment provisions.

The Secretary, in his Findings in support of the 1958 amendment, pointed out that the change in the nature of the election provision "would not change the economic position of a plant".[1] He stated further that non-pool status should be established only as a result of positive choice on the part of a handler in view of "the resultant prospective or possible obligation for compensatory payments . . ." [2]

The election offered by the 1958 amendment afforded the Petitioners no opportunity for a free choice between pool and non-pool status. Their position on the effective date of the amendment was no different than the position they took the first day they came under the provisions of Order No. 27, i.e., that the compensatory payment provisions set forth in Section 927.83 of the Order were invalid. Petitioners elected to continue their non-pool plant status. Their election, regardless of the amendment of 1958, bound them to comply only with a valid and lawful compensatory payment provision. Section 927.83 was not such a provision at its inception and did not become so on September 1, 1958, since it was not changed or amended in any manner.

The District Court below held on this point as follows:

> ". . . Thus, if the compensatory payment provisions are struck down, no money should be paid the Market Administrator under those provisions. This is true regardless of whether plaintiffs were nonpool plants *by choice or by necessity*, unless we were to hold that by striking down the compensatory payment provisions, the

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[1] 23 F. R. 6054.

[2] *Ibid.*

> Court automatically forced the plaintiffs into a fully regulated status under the terms of the September 1, 1958 amendment to Order No. 27. We flatly reject this conclusion. It may be that the Secretary could enforce full regulation upon handlers such as the plaintiffs by an appropriate order. See *Titusville Dairy Products Co. v. Brannan*, 176 F. 2d 332 (3rd Cir. 1949), cert. denied 338 U.S. 905. We do not feel that by promulgating the September 1, 1958 amendment granting handlers an 'election' between full and partial regulation, he intended to do so." (Emphasis added). (R. 229a).

Since the Congressional delegation of power to the Secretary did not include a right to designate one set of handlers as pool and the other set as non-pool and impose non-uniform regulations upon them, the Secretary himself has no authority to delegate to an individual handler the right to determine for himself whether he will be a pool or non-pool handler. We are dealing here with a basic lack of statutory power which, if not granted by Congress to the Secretary, cannot be supplied under any theory of estoppel.[3]

The Secretary contends that inasmuch as the Act confers upon him authority to regulate all handlers fully,[4] Petitioners cannot be heard to complain if only partial regulation is imposed upon them. The authority of the Secretary to regulate Petitioners fully is not before the Court in this controversy. It may well be that such power does, in fact, *not* reside in the Secretary at all *with regard to these Petitioners.* That question need not and cannot be decided in this litigation. The

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[3] There can be no substance to the idea that, having selected one of two proffered choices, Petitioners are thereby estopped from challenging incidents which flow illegally from the chosen position. See *Stark v. Wickard*, 321 U.S. 288, 304, 88 L. Ed. 733, 744, (1944):

> "It cannot be fairly said that because producers may choose not to sell in the area, those who do choose to sell there necessarily must sell, without a right of challenge, in accordance with unlawful requirements of administrators."

[4] *Titusville Dairy Products Co. v. Brannan*, 176 F.2d 332, (1949) cert. den. 338 U.S. 905, 94 L. Ed. 557.

only relevant question is whether the Secretary has authority to impose the contested assessment upon Petitioners. Whatever may be his plenary powers, the Secretary may not under the guise thereof impose invalid requirements upon Petitioners in any form. Every administrative action of the Secretary must be in accordance with the power and authority granted him in the Act, and must be executed in conformity with the standards therein contained.

VII. The Credit Provision of Federal Order No. 61, the Order Regulating the Handling of Milk in the Philadelphia Milk Marketing Area, Does Not Validate the Compensatory Payment Provisions of Order No. 27

Petitioner Lehigh Valley is fully regulated by the terms of another Federal Order, i.e., Order No. 61, effective in the Philadelphia Milk Marketing Area.[1] Petitioner Suncrest Farms, Inc., on the other hand, is a handler regulated by no other Federal Milk Marketing Order. The Secretary argues that in view of this difference and the inter-relationship of certain provisions of Order No. 61 and Order No. 27, the requirements of uniformity under Section 8c(5)(A) have been met, and the compensatory payment provision of Order No. 27 must, therefore, be valid insofar as Lehigh Valley is concerned.

Section 83 of Order No. 27 [2] provides, *inter alia* that the compensatory payment shall be the difference between Class I and Class III prices where another Federal Order permits the deduction of such payment from the amount otherwise due for such milk pursuant to such other Order. This the Philadelphia Order does.[3]

The result is that a milk handler who is fully regulated under Order No. 61 is obligated to pay for milk disposed of in the New York Marketing Area the Order No. 27 Class

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[1] 7 C.F.R. Part 961.

[2] 7 C.F.R. 927.83.

[3] 7 C.F.R. 961.53.

I-A price. A part of that price, the difference between the Order No. 27 Class I and Class III prices, he pays into the New York equalization pool for distribution among the 50,000 producers who make up that pool, of which his producers are not a part. The balance only would remain for payment to the farmers who produce the milk and from whom he purchases and receives it.

The issuance of such orders by the Secretary is completely inconsistent with the position he now takes before the Courts that Section 8c(5)(A) has no application to prices to be paid by non-pool handlers. If as the Secretary now contends there is no requirement of price uniformity with regard to non-pool handlers, it is fair to inquire why he found it necessary to make provision by amendment of Order No. 61 for any credit provision whatsoever. The only reasonable explanation is that the Secretary at that time, in view of the legislative history, the judicial decisions on point, and the well considered opinions of all those familiar with the operations of the Agricultural Marketing Agreement Act, recognized his obligation under the Act to regulate all handlers, pool and non-pool, in a uniform manner.

The Secretary's issuance of the credit provision of Order No. 61, however, did not produce price uniformity between pool and non-pool handlers under Order No. 27. Price uniformity can only be achieved, even under the credit provision, if the non-pool handler can acquire the milk needed for his sales in the New York Marketing Area, by payment to his producers of the New York Class III price for it. The District Court in the instant cases found no milk available to Petitioners at the Class III price [4].

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[4] R. 223a, footnote 9:

"The government makes much of the fact that plaintiff Lehigh Valley Cooperative Farmers, Inc. which has also been regulated under Federal Order No. 61 for Philadelphia since July 1, 1957 and is thereby charged compensatory payments pursuant to § 927.83(b)(1), rather than § 927.83(b)(2) which regulates the compensatory payments of plaintiff Sunerest Farms, Inc. Actually the amount of compensatory payments

The credit provisions are also inconsistent with the provisions of Section 8c(5)(B) of the Act, which requires that prices received by producers for their milk must be uniform. In fact, the credit system makes it absolutely impossible to achieve uniformity of producer returns for the milk shipped into the marketing area. The milk of both pool and non-pool producers is sold in the marketing area for fluid use but the prices they receive are entirely dissimilar. The New York pool producer is paid the Class I price through the operation of the equalization pool, plus his share of the compensatory payment increment involved in the sale of the other producers' milk. By virtue of the Secretary's order the outside producer must be satisfied with the New York Class III price.

VIII. Section 927.83 Provides for Penalties, Not Compensatory Payments, and As Such Violates Section 8c(5)(A) and 8c(5)(G) of the Act

A realistic evaluation of the "compensatory" payment provisions here under attack will quickly dispel the fiction that they are designed to equalize handlers' costs. They stand exposed as penalty payments to exclude non-pool handlers from the market. The "compensatory" payment here is approx-

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for each will be the same, since § 927.83(b)(1) specifically provides that payments under that section 'shall be at the rates set forth in subparagraph (2) (i.e., Sunerest's rate) if the other Order permits . . . [certain deductions]'. Order No. 61 does permit such deductions. Therefore Lehigh Valley must also pay the difference between the Class I and Class III Order No. 27 price into that Producer Settlement Fund. Although it is then required to pay only the Class III price to its producers under the terms of Order No. 61, the uncontroverted facts in this case are that it can NOT purchase raw milk from its producers at that low price and in fact is forced to pay more for it. Thus its *actual cost* plus the compensatory payment is substantially higher than the cost to fully regulated Order No. 27 handlers. This runs afoul of the *Kass* holding. For this reason we have not disinguished between the plaintiffs throughout our opinion. If *Kass* is followed, both plans seem equally objectionable."

imately 5¢ to 6¢ per quart of milk. The price which Petitioners must pay for the milk plus the addition of the "compensatory" payment would develop a cost to them 40% to 60% higher than that of their pool plant competition in the same area. In these circumstances, the only alternative offered Petitioners is withdrawal from the North Jersey market.

Throughout the *Kass* case the Court characterizes the disputed "compensatory" payment as a "penalty" upon a handler.[1] The penalty is imposed upon a handler who acquires non-pool milk for sale into the marketing area. It should be remembered that all such milk must qualify under the health and sanitation requirements imposed by the various regulatory bodies upon any milk sold in the area.

The phrase "compensatory payment" implies that Petitioners as non-pool handlers are under an obligation to compensate some one for a loss occasioned by their sales of milk in the marketing area. The compensatory payment is obviously not payment to the farmers who produce the milk marketed in the area by Petitioners. The payments are in fact made to the equalization fund for the benefit of the producers who ship their milk to pool plants. It cannot be contended that the payments are made to the pool to cover any loss suffered by pool producers since the sales made by Petitioners have been an integral part of Petitioners' regular sales and distribution pattern for many years. The fact is clear that the payments are penal and not compensatory in any regard, and are imposed upon a non-pool handler as a condition to his right to continue to sell fluid milk in the marketing area. As penalties, they are invalid, produce non-uniform prices be-

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[1] 196 F. 2d 791, at page 795:

"... The total exactions required from the plaintiff were about $10,000. His brief describes them as 'penalty' payments, as did the witnesses at the promulgation hearing and the hearing examiner in his recommendations. Carefully avoiding the word 'penalty', the Secretary's brief describes them as 'compensatory' payments, i.e., compensation for competition of non-pool milk with pool milk. We think 'penalty' is the more accurate description."

tween pool and non-pool handlers, and prohibit the flow of milk into the marketing area.

IX. Conclusion

For the reasons above stated it is respectively requested that the decision of the Court of Appeals for the Third Circuit be reversed, that the compensatory payment provisions of Order 27, 7 C.F.R. 927.83 and 927.84, be declared invalid, and that the Petitioners be allowed to withdraw all monies heretofore paid by them into the registry of the District Court.

Respectfully submitted,

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